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No. 77-1637

In the

Supreme Court of the United States

OCTOBER TERM, 1977

R. B. ROBINSON, Individually and as next of Friend of C. K. ROBINSON, a Minor, and in a Representative Capacity on behalf of all settlors and natural person beneficiaries of trusts,

Petitioner,

vs.

STANLEY T. KUSPER, JR., County Clerk of the County of Cook, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois

BRIEF FOR RESPONDENTS IN OPPOSITION

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STATEMENT

The Statement as presented in the instant Petition for a Writ of Certiorari is accurate, but incomplete in certain essential respects. The following statement will contain those essential omissions of fact.

On November 3, 1970, the voters of Illinois approved the inclusion of Article IX-A in the 1870 Constitution, which prohibited the taxation of personal property by valuation as to individuals.

Six weeks later, December 15, 1970, the Illinois Constitution of 1970 was approved by the people of Illinois and included Article IX, Section 5(b), which carried over into the new Constitution the prohibition of Article IX-A of the 1870 Constitution of personal property taxation as to individuals.

The constitutionality of this prohibition on the taxation of personal property as to individuals was initially challenged in *Lake Shore Auto Parts Co.* v. *Korzen,* 49 Ill. 2d 137 (1971.) The Illinois Supreme Court viewed Article IX-A as simply promoting a policy of freeing one set of property owners from the burden of a tax imposed upon another set and therefore held that this discrimination violated the equal protection clause of the fourteenth amendment, 49 Ill. 2d at 151.

That decision, however, was reversed by this Court in *Lehnhausen* v. *Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973.) In concluding that equal protection standards were not violated, this Court observed at p. 364.

> "Approval of the treatment with that separateness which distinguishes public service corporations from others: *ibid.* leads us to conclude in the present cases that making corporations and like entities, but not individuals, liable for *ad valorem* taxes on personal property does not transcend the requirements of equal protection."

A problem was created by this language of Mr. Justice Douglas, who was speaking for a unanimous Supreme Court. The phrase "corporations and like entities" was uncertain in definition and created confusion in to which entities were still properly subject to personal property taxation. Upon remand to the Illinois Supreme Court for further proceedings, the parties and other interested persons were directed to submit memoranda to the court stating their views as to the interpretation of the United States Supreme Court's opinion. Among those submitting memoranda was William R. Dillon, as attorney for *amici curiae,* the members of the Corporate Fiduciaries Association of Illinois. Mr. Dillon, who is also one of the attorneys for the petitioner in the present cause, filed a lengthy memorandum entitled "Suggestions in the Nature of a Brief" and later filed a "Supplement to his Suggestions in the Nature of a Brief."

This court, after considering all the memoranda filed delineated the types of property still subject to personal property taxation;

> "The personal property thus left subject to taxation under Article IX-A includes the following categories of ownership; partnerships, limited partnerships, joint ventures, professional associations and professional service corporations. Trustees and other fiduciaries, whether corporate or not, do not own property as natural persons, and they were not exempted from taxation by Article IX-A. Bank stock, like other shares of any other corporation, is exempt only when owned by a natural person or by two or more natural

persons as joint tenants or tenants in common." *Lake Shore Auto Parts Co.* v. *Korzen*, 54 Ill. 2d 237, 239 (1973).

Within a week after the April 25, 1973 opinion of the Illinois Supreme Court on remand in *Lake Shore*, attorney William R. Dillon (who, as noted earlier, represents the present petitioner) filed a class action complaint entitled *Hanley* v. *Kusper* on behalf of thirteen plaintiffs representing various classes of fiduciaries, trustees and individual beneficiaries of fiduciary relationships. The basic thrust of their lawsuit was that Article IX-A was intended to exempt personal property held for individuals by trustees and other fiduciaries.

In determining the validity of the *Hanley* complaint, the Illinois Supreme Court first considered defendants' contention that the earlier decisions of the court in *Lake Shore* were fully determinative of the *Hanley* issues under the doctrine of *stare decisis*:

> "It is true that the basic contentions now advanced were before the court in the earlier cases, although perhaps without some embellishments and refinements that are now included. It is true that the 'legislative' materials now emphasized were before us when those cases were decided. Nevertheless, because of the continuing importance of the question, we have decided to examine once more the interpretive materials and the arguments advanced in favor of a construction of Article IX-A that would exempt from taxation all personal property held by trustees for the benefit of individual natural persons." *Hanley* v. *Kusper*, 61 Ill. 2d 452, 456-457 (1975).

In rejecting plaintiffs' contention that all trust and fiduciary arrangements for the benefit of natural persons are not exempt from personal property taxation, the *Hanley* court carefully and fully examined the legislative history of Article IX-A, including Senate Joint Resolutions 30, 43 and 67. The court noted that when the "arguments against" Article IX-A were originally proposed, they included the statement that property held in trust would be subject to personal property taxation. However, the court also noted that a later corrected report substituted the following language:

> "That which is owned by or held in a fiduciary capacity for the benefit of natural persons is exempted from taxes; that which is owned by corporations, etc., is subject to taxes." 61 Ill. 2d 458-459.

In the court's view, however, this was not a sufficient indication that the 1969 General Assembly, in proposing Article IX-A, intended to exempt trusts from personal property taxation:

> "The plaintiffs would have us look only at the statement contained in the minority argument against the amendment which they repeatedly describe as the "Explanation" of Article IX-A. But the explanation of the amendment which is required to be printed on the face of the ballot is obviously not the same as the argument against it, which, under the statute may be prepared by the minority 'if they so desire.' In our opinion the court is not justified in relying upon arguments against a proposed constitutional amendment 'as seen by the minority' to determine its meaning after adoption. A precedent so holding would be mischievous in the opportunity it would afford a minority to frustrate the purpose of the General Assembly and the voters. We are not aware of any opinion of this court which has countenanced such a reliance." 61 Ill. 2d at 459-460.

The court focused instead on the meaning of the "Explanation of Amendment" which was printed on the bal-

lot and which none of the plaintiffs analyzed. That explanation stated that the abolition of personal property tax "would not affect the same tax levied against corporations and other entities not considered in law to be individuals." Since trustees are not "considered in law to be individuals" and since personal property taxes had always been levied against the trustee and not the beneficiary, the court was unwilling to believe that the General Assembly regarded a tax levied against a bank as trustee as a tax "levied against an individual." 61 Ill. 2d at 460. Additionally, the court noted that plaintiffs tended to ignore the specific explanation of the phrase "as to individuals" contained in Senate Joint Resolution No. 67 and the emphasis which that resolution placed upon ownership by "a natural person, or two or more natural persons as joint tenants or tenants in common." 61 Ill. 2d at 460-461.

It was also observed in *Hanley* that neither a trustee nor a beneficiary owns property as a natural person does. Instead, like a corporation, partnership and unincorported association, a trust is a legal abstraction created to enable natural persons to achieve results not otherwise possible if they owned property as natural persons. 61 Ill. 2d at 461. Consequently, the court again rejected the claim that all personal property held in trust for natural persons is exempt from taxation. 61 Ill. 2d at 463.

However, the court did decree that there are certain situations where property held by fiduciaries can fairly be said to have been intended to be exempt from taxation. Such situations involve instances where the natural person who owns the property is "prevented by law from dealing with it as a natural person." 61 Ill. 2d at 463. Specific examples listed in the *Hanley* opinion were instances involving estates, and property held by a minor

or an incompetent. The following rationale for exemption of these types of property was provided by the court:

> "In each of these situations the fiduciary relationship comes into being because the law prevents a particular class of natural persons (heirs or legatees of decedents, incompetents or minors) from exercising property rights that are available generally to other natural persons. These situations in our opinion, are distinguishable from voluntary fiduciary relationships created to accomplish results that could not be achieved so long as the property is owned by a natural person. To the extent thus indicated, our decision in *Lake Shore Auto Parts Co.* v. *Korzen,* 54 Ill. 2d 237 (1975) is overruled." 61 Ill. 2d at 463.

However, the trust industry in Illinois was not satisfied with the determination in *Hanley* that voluntary fiduciary relationships were still subject to personal property taxation. But rather than seeking certiorari in this Court, its counsel, William R. Dillon, filed yet two more lawsuits: the instant cause and *American National Bank* v. *Kusper* which were consolidated in the trial court as well as the Illinois Supreme Court.

However, once again the Illinois Supreme Court reiterated its position that voluntary fiduciary relationships are properly subject to taxation. *American National Bank and Trust Co.* v. *Kusper,* 69 Ill. 2d 374 (1978) The Court pointedly noted that "the appeals now before us mark the third occasion on which we have been asked to construe Article IX-A of the 1870 Constitution as applied to fiduciaries." 69 Ill. 2d at 386 and "although their approach is somewhat different, the plaintiffs in these consolidated appeals are again asking for a reconsideration of the conclusions reached in the *Lake Shore* and *Hanley* cases with respect to the taxability of personal property held by a fiduciary." 69 Ill. 2d at 389.

With specific reference to the *Robinson* case now before this Court, the Illinois Supreme Court observed:

> "Count II of plaintiff's amended complaint in No. 49267 involves essentially the same questions previously raised in *Hanley* with regard to the intent of the General Assembly when it proposed Article IX-A and the content of the informational pamphlet concerning the proposed amendment which was mailed to the referendum thereon. It is unnecessary to re-examine these matters here. We did not then and we do not now agree with plaintiff's argument that the information given to voters prior to the referendum on Article IX-A was false and misleading, and we likewise find no merit in the allegations that her right to vote would be unconstitutionally abridged unless Article IX-A is construed in the manner she proposes. We accordingly hold that the trial court did not err in granting defendants' motion to dismiss Count II of plaintiffs' second amended complaint in Cause No. 49267." 69 Ill. 2d at 390.

It is from this adverse ruling that certiorari is sought from the Supreme Court.

ARGUMENT

I.

THE DECISION BELOW DID NOT DEPRIVE PETITIONER OF HER PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner contends that the Illinois Supreme Court, in refusing to give effect to the express representations made to petitioner and others by the Illinois General Assembly in its explanation of Article IX-A as sent to the voters of Illinois prior to referendum, deprived her and the members of the class she represents of their property without due process of law.

However, as indicated in *Thompson* v. *Commonwealth of Kentucky*, 209 U.S. 340, 346 (1908), there has been no violation of due process in this instance:

> "Due process of law does not assure to a taxpayer the interpretation of laws by the executive officers of a state as against their interpretation by the courts of the state, or relief from the consequences of a misrepresentation by either . . . . it is the province of the courts to interpret the laws of the state, and he who acts under them must take his chance of being in accord with the final decision. And this is a hazard under every law, and from which or the consequences of which we know of no security.

Consequently, merely because petitioner had a differing view of the meaning of Article IX-A than that later determined by the Illinois Supreme Court did not constitute a denial of any due process rights.

But aside from the due process question respondents take issue with and wish to respond to the contention of the petitioner that the explanation of Article IX-A as sent to the voters clearly indicated an intent to exempt trusts from personal property taxation.

The sole evidence proffered by petitioner which existed at the time Article IX-A was considered and approved by the voters of Illinois was the language of the "arguments against" Article IX-A which was included among the materials sent to all the voters prior to the referendum on Article IX-A:

> "It is discriminatory because . . . property . . . which is owned by or held in a fiduciary capacity for the benefit of natural persons is exempted from taxes; that which is owned by a corporation, etc., is subject to taxes."

However, this same language has been repeatedly relied upon in prior related litigation by William R. Dillon, one of the attorneys for petitioner Robinson in support of the same argument proffered by him here. In *Hanley* v. *Kusper*, 61 Ill. 2d 452 (1975) the Illinois Supreme Court addressed itself squarely to this issue:

> "The plaintiffs would have us look only at the statement contained in the minority argument against the amendment which they repeatedly describe as the "Explanation" of Article IX-A. But the explanation of the amendment which is required to be printed on the face of the ballot is obviously not the same as the argument against it, which, under the statute, may be prepared by the minority "if they so desire." In our opinion the court is not justified in relying upon arguments against a proposed constitutional amendment "as seen by the minority," to determine its meaning after adoption. A precedent so holding

> would be mischievous in the opportunity it would afford a minority to frustrate the purpose of the General Assembly and the voters. We are not aware of any opinion of this court which has countenanced such a reliance." 61 Ill. 2d at 459-460.

The court went on to note in *Hanley* that none of the plaintiffs analyzed the meaning of the key words of the "Explanation of Amendment" which was printed on the Article IX-A ballot and which stated that Article IX-A would not affect personal property tax "levied against corporations and other entities not considered by law to be individuals". Since personal property taxes had always been "levied against" trustees and since trustees are not "considered in law to be individuals" the court was unwilling to believe that the General Assembly regarded a tax against the Continental Illinois National Bank and Trust Company as trustee, for example, as a tax "levied against" an individual. (61 Ill. 2d at 460).

The court also went on to observe that the *Hanley* plaintiffs tended to ignore the specific explanation of the phrase "as to individuals" that was contained in Senate Joint Resolution No. 67 wherein an emphasis was placed upon ownership by "a natural person, or two or more natural persons as joint tenants or tenants in common." (61 Ill. 2d at 460-461).

Since neither a trustee nor a beneficiary owns property as a natural person does, the court in *Hanley* "again rejected the claim that all personal property held in trust for natural persons is exempt from taxation." (61 Ill. 2d at 461, 463). (The same determination was reached in the subsequent *American National Bank* v. *Kusper* case 69 Ill. 2d 374 (1978), which is the subject of this certiorari petition.)

Having failed to convince the court in *Hanley* v. *Kusper* that the materials sent to the voters for the referendum on Article IX-A evidenced a legislative intent to exclude from taxation personal property held by or owned by fiduciaries for the benefit of natural persons, attorney Dillon attempted a slightly different approach in the present case. He included the affidavits of members of the 76th General Assembly which allegedly support his contention that Article IX-A was intended by the 1969 legislature to relieve all natural persons of the burden of the tax on personal property even if their property were held in trust. (See petition for certiorari, p. 13)

However, as noted in Sutherland's treatise on *Statutory Construction* (4th Ed.) Vol. 2A § 48.12, pp. 214-215 these affidavits are not a proper indication of legislative intent:

> "Modern English practice, however, excludes the views of draftsmen from consideration as grounds on which to construe a statute. The reasons for this application of the general British rule excluding extrinsic aids was well stated by the Earl of Halsburg:
>
> > 'My Lords, I have more than once had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect to what was intended, but he may be mistaken in construing it afterwards just because what was in his mind was what was intended, though, perhaps it was not done.'
>
> In recognition that there is no necessary correlation between what the draftsman of the text of a bill

> understands it to mean and what members of the enacting legislature understand, and that the intent of the legislature is the determining consideration as compared to the views of draftsmen, their views are not generally considered proper grounds on which to base the interpretation on an act, in this country any more than in England."

But beyond the unpersuasive nature of these affidavits, it is abundantly clear that the meaning of Article IX-A was uncertain to both the 76th General Assembly and to the Sixth Illinois Constitutional Convention which considered the issue of personal property taxation. The lack of any legislative history as to Article IX-A's meaning is well illustrated by a colloquy which occurred during the June 19, 1970 debates at the Constitutional Convention involving Delegate Paul Elward who was also a member of the 76th General Assembly:

> "Mr. Karns: I want to be accurate, and I will ask Maurie (Maurice Scott) if this is accurate. In the original Resolution (S.J.R. 30) there is no legislative history. Is that correct, Maurie?
>
> Mr. Scott: That's right.
>
> Mr. Karns: The recent resolution, (S.J.R. 67), I assume, was an attempt to clarify what is meant by "individuals", but in certain respects only. Would that be accurate, Maurie?
>
> Mr. Scott: Right.
>
> Mr. Karns: And, as Delegate Elward will point out, I don't think this matter was—was it discussed in the house at all, Delegate Elward?
>
> Mr. Elward: The answer is no. It came in after the time for joint submission last year. It was not presented properly to the legislature." Vol. III. Report of Proceedings, Sixth Illinois Constitutional Convention p. 1913 (hereafter "Proceedings").

(See also Volume III, Proceedings p. 1910).

Additionally, there was no testimony presented to the Revenue Committee of the Constitutional Convention as to the meaning of the term "individual" within Article IX-A. (Vol. III, Proceedings, p. 1910).

Because of this lack of both legislative history and testimony before the Constitutional Convention's Revenue Committee the meaning of Article IX-A was unclear to the convention delegates, Mr. Elward included. He described Article IX-A as "one of those weird and wonderful products of the General Assembly that nobody is quite sure what it means. It was run through last year in haste." Vol. III, Proceedings, p. 2039. And as Delegate Stanley Johnson noted during the constitutional debates on June 25, 1970:

> "No, I would not, Delegate Elward. We would agree to eliminating the words "or not imposed" and "or imposed" but I am surprised you would ask me to put in the words "as to individuals" because you and I have discussed this many times and agreed that neither one of us knows what that means." Vol. III, Proceedings, p. 2049.

This uncertainty as to the meaning of Article IX-A was also evidenced during a colloquy between Delegates Leahy and Strunck later that same day, June 25, 1970:

> "Mrs. Leahy: I have a question for Delegate Strunck, I think there has been quite a bit of testimony that the General Assembly was not clear as to what they meant when they used the word "individuals". I thought there was testimony that even the resolution that passed a year later—or several months later—didn't clear up all that ambiguity. Therefore, I have real problems with your introducing this ambiguous word. Would you tell me what you mean by "individual"?

> Mr. Strunck: Answering your question, Delegate Leahy, I can only say that this is the word that the voters are going to vote upon in November, and I think the voter is entitled to vote as he sees fit on his interpretation of the word "individual". I have heard all sorts of interpretations of what the word "individual" means or can be construed to mean, but I think if this is the language of the proposed amendment, this is the language we should stay with.
>
> Mrs. Leahy: Then you are not sure—it will mean whatever the court decides it means after the amendment carries, if it does carry in November.
>
> Mr. Strunck: Yes." Vol. III, Proceedings, p. 2055.

Admittedly, there were some convention delegates who believed that the term "individual" in Article IX-A was intended to mean all non-corporate entities. Indeed, Delegate Thomas G. Lyons contended during the debates of June 30, 1970 that "after this November there will be nothing else left on the personal property tax rolls except the personal property of corporations." Vol. III, Proceedings, p. 2147. Delegate Thomas McCracken was of a similar opinion and on August 8, 1970 even proposed an amendment that replacement taxes shall come "solely out of the proceeds of a statewide tax imposed only for that purpose exclusively against corporations." Vol. V, Proceedings, p. 3833. However disagreement with this proposal was immediately voiced during the debates by Delegate Mullen:

> "I have a question for Delegate McCracken. It is assumed, I think, that after November 3 Delegate McCracken is assuming the only personal property tax that will remain will be that on corporations. I think there is a difference of opinion. . ." Vol. V, Proceedings, pp. 3833-3834.

Delegate McCracken responded by stating:

> ". . . I don't think the supreme court is going to interpret the term "individual" as it is used in the November referendum, in a narrow sense, I think it's going to be interpreted as applying broadly to all types of property owned by natural persons." Vol. V, Proceedings, p. 3834.

Mr. McCracken was wrong in his assessment of the future judicial treatment of Article IX-A. He was also unsuccessful in limiting the replacement tax solely to corporations. After consulting with other Constitutional Convention delegates overnight, Mr. McCracken himself proposed on the next day, August 9, 1970, that the replacement revenue be obtained from "statewide taxes on the class or classes of persons relieved of the burden of such *ad valorem* taxes." (See Journal for August 9, 1970, Vol. I, Proceedings, p. 577). In explaining the reason for the change in the replacement tax language McCracken noted that when he had used the term "corporations" in his proposal the day before he "was under the assumption that the supreme court would interpret the term 'individual' very broadly, and, in fact, only corporations would be left on the roll." Vol. V, Proceedings, p. 3888. However, he was convinced overnight that the term "individual" might be defined more restrictively:

> "We have provided for the possibility that either it does not pass—that is, the referendum does not pass —or if the referendum does pass, that the court does not interpret the term "individual" broadly. We have provided for both contingencies, and that's the reason why we have used the words 'class or classes.' We intend there, not subclasses—that is, not different types of corporations—but corporations versus unincorporated businesses, if in fact, unincorporated businesses are not exempted as a result of the November referendum or the referendum does not pass." Vol. V, Proceedings, p. 3888.

Indeed, Mr. McCracken even allowed for the possibility that trusts might be subject to taxation!:

> "I am not sure of the supreme court's interpretation of the term 'individual', but I may be talking about sole proprietors, I may be talking about partnerships, I definitely am talking about corporations, I may be talking about trusts, and I may be talking about estates. That, I think, exhausts the possibilities." Vol. V, Proceedings, p. 3889.

If, as petitioner contends, the 76th General Assembly intended to remove the burden of taxation from personal property held by fiduciaries for the benefit of natural persons, then that intention was not clearly manifested to the members of the Constitutional Convention who repeatedly stated during the debates that they were uncertain as to the definition of an "individual" within the meaning of Article IX-A.* And if the members of the Constitutional Convention, who carefully studied and extensively debated the issue of personal property taxation, were unclear as to the meaning of Article IX-A, it cannot be credibly argued that the voters of Illinois, who approved Article IX-A in November, 1970, intended

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*Gerhard Casper, in a paper prepared for the Illinois State Chamber of Commerce dated October, 1972, which was included in two-volume collection of materials relating to the replacement of the Illinois personal property tax, concurs with this assessment: "Neither the General Assembly nor anybody else was exactly clear about what Senate Joint Resolution No. 30 meant when referring to abolition of personal property tax "as to individuals." (p. A-2).

to exempt the personal property in question from taxation.

Rather, the activities of both the 76th General Assembly in drafting Article IX-A, as well as the Constitutional Convention in considering the issue of the taxation of personal property, point to the conclusion that the exact meaning of Article IX-A was unclear and it was left to the courts for resolution. As has been noted by Paula Wolff and Wayne W. Whalen, who served as Chairman of the Committee on Style, Drafting and Submission at the Constitutional Convention:

> "The political possibilities offered by subsequent judicial review were not lost on the delegates to the Sixth Illinois Constitutional Convention. Anticipation of judicial review provided the delegates with the opportunity to draft intentionally ambiguous provisions for inclusion in the constitution. The delegates envisioned that these ambiguities would ultimately be resolved by the courts." Vol. XXII, De Paul Law Review 63, 65 (1972).

In short, it was intended by the Constitutional Convention, which had received no guidance from the General Assembly as to the meaning of Article IX-A, that IX-A "will mean whatever the court decides it means, after the amendment carries, if it does carry in November." (Delegate Leahy, June 25, 1970. Vol. III, Proceedings, p. 2055). The Illinois Supreme Court has determined, after a careful consideration of the issue in *Lake Shore Auto Parts Co.* on remand, *Hanley* v. *Kusper* and *American National Bank* v. *Kusper*, that voluntary fiduciary arrangements for the benefit of natural persons are still subject to personal property taxation. Merely because plaintiff Robinson may have erroneously believed

in voting to approve Article IX-A that its ratification would erase the personal property taxation as to trusts does not constitute a violation of due process particularly when the only concrete evidence supporting her position is in the language *in opposition* to Article IX-A**

II.

A.

PETITIONER, IN FAILING TO RAISE THE ISSUE IN THE LOWER COURTS, HAS THEREBY WAIVED ANY ARGUMENT THAT THE ACTION OF THE ILLINOIS SUPREME COURT HAS UNCONSTITUTIONALLY IMPAIRED THE OBLIGATION OF CONTRACT.

Petitioner alleges that the action of the Illinois Supreme Court in relying upon Senate Joint Resolution No. 67, which was adopted by the Illinois General Assembly after the report concerning Article IX-A was prepared, and which, unlike the Article IX-A report, was never mailed to the Illinois electorate, constituted an impairment of the obligation of contracts in violation of Article I, Section 10 of the United States Constitution. (Petition for Writ of Certiorari, p. 16.)

Petitioner also maintains that this impairment of contract issue arose for the first time by reason of the judg-

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** Petitioner notes at pages 13 & 14 of her petition that the opinions of both the Attorney General and the Cook County State's Attorney have held that the General Assembly intended to exempt personal property in trust for the benefit of natural persons. However, under Illinois law such opinions are not binding, (*People* v. *Savaiano*, 66 Ill. 2d 7, 15-16 (1976); *Rogers Park Post No. 108* v. *Brenza*, 8 Ill. 2d 286, 292 (1956)) particularly when the Illinois Supreme Court later ruled to the contrary in *Lake Shore* on remand, *Hanley* v. *Kusper* and *American National* v. *Kusper*.

ment of the Supreme Court of Illinois in this cause. (Certiorari petition, p. 11.)

However, this assertion is erroneous and is rebutted by the very language of her certiorari petition. Indeed, it is noted at page 19 of that petition that the Illinois Supreme Court utilized Senate Joint Resolution No. 67 to determine the meaning of Article IX-A in the initial case wherein the constitutionality of Article IX-A was considered. (*Lake Shore Auto Parts Co.* v. *Korzen,* 49 Ill. 2d 137, 148 [1971]) and has continued to rely on it in its subsequent related opinions. (*Lake Shore Auto Parts* v. *Korzen,* on remand from the United States Supreme Court, 54 Ill. 2d 237, 239 [1973]; *Hanley* v. *Kusper,* 61 Ill. 2d 452, 460 [1975]; *American National Bank* v. *Kusper,* 69 Ill. 2d 374, 386, 390 [1978]).

William R. Dillon, one of the attorneys for the instant petitioner, has filed pleadings in the last three of these cases on behalf of the trust industry in Illinois. In each of these cases the issue of the propriety of the use of Senate Joint Resolution No. 67 in determining the meaning of Article IX-A has arisen. It therefore cannot be credibly maintained that the issue involving the impairment of petitioner's contract rights arose for the first time in the most recent related Illinois Supreme Court opinion, *American National Bank* v. *Kusper,* which was consolidated with the present cause in that court.

In short, by failing to raise the issue in any prior proceeding in Illinois, thereby precluding the Illinois Supreme Court from considering the question, petitioner's counsel is barred under the doctrine of waiver from raising the issue now for the first time. As was observed in *United Railways & Electric Co. of Baltimore* v. *West,* 280 U.S. 234, 248-249 (1930):

> "The commission in the present case, accordingly, included the amount in the valuation and made no attack upon the item in the courts below, where it passed as a matter not in dispute. The item is now challenged by counsel for the commission in this court, and other objections to the valuation are suggested, likewise for the first time. We do not find it necessary to consider this challenge or these objections, for, if they ever possessed substance, they come too late."

See also, *Weade* v. *Dichmann, Wright, & Pugh, Inc.,* 337 U.S. 801, 808 (1949); *Denver Union Stock Yard Co.* v. *U.S.* 304 U.S. 470, 484 (1938.)

Consequently, petitioner is precluded under the waiver doctrine from raising for the first time in this court the impairment of contract issue when it could have readily been raised in the courts below.

II.

B.

ASSUMING ARGUENDO THAT PETITIONER DID NOT WAIVE THE ISSUE, THERE NEVERTHELESS WAS NO IMPAIRMENT OF THE OBLIGATION. OF CONTRACT.

Article I, Section 10 of the United States Constitution provides in part that: "No State shall . . ., pass any . . . law impairing the obligation of contracts."

Petitioner contends at page 20 that Senate Joint Resolution No. 67, which was passed subsequent to the approval of Article IX-A by the General Assembly for submission to the voters of Illinois impaired the obligation of contract.

Even assuming *arguendo* that this issue was not waived for failure to present it to the lower courts in this cause, the contention is nevertheless totally without basis.

As noted at page 7 of her certiorari petition, Senate Joint Resolution was adopted by the Illinois Senate on May 19, 1970 (Appendix p. A. 44) and concurred in by the House on May 29, 1970 (Appendix p. A. 45)

However, it was not until nearly seven months later that petitioner created the irrevocable trust in issue for the benefit of her son and daughter. (Petition, p. 10)

This court has often noted that a contract can be impaired within the meaning of Article I, Section 10 only when it is affected by a law passed subsequent to the time the contract became effective As was observed in *Bacon* v. *State of Texas,* 163 U.S. 207, 216 (1896):

> "Where the federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired, within the meaning of this clause in the constitution, and so as to give this court jurisdiction on writ of error to a state court, by some subsequent statute of the state which has been upheld, or effect given it by the state court.

See also *Coolidge* v. *Long,* 282 U.S. 582, 595 (1931); *Columbia Ry. Gas & Electric Co.* v. *State of South Carolina,* 261 U.S. 236, 244 (1923).

Furthermore, the authority of this court under the impairment of the obligations of contracts clause does not reach mere errors committed by a state court when passing upon the validity or effect of a contract under the laws in existence when it was made. *Cross Lake Shooting & Fishing Club* v. *State of Louisiana,* 224 U.S. 632, 637 (1912).

Consequently, since Senate Joint Resolution No. 67 was enacted prior to the creation of the irrevocable trust of the petitioner, its utilization by the Illinois Supreme Court in defining the meaning of Article IX-A cannot be considered as an impairment of the obligation of contract.

CONCLUSION

For the foregoing reasons respondents respectfully request that the instant Petition for a Writ of Certiorari to the Supreme Court of Illinois be denied.

Respectfully submitted,

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